No. 13047.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN,

Appellant,

vs.

VIVIAN WINGET and THOMAS B. MACK,

Appellees.

VIVIAN WINGET,

Appellant,

vs.

STANDARD ACCIDENT INSURANCE COMPANY OF DETROIT, MICHIGAN, and THOMAS B. MACK,

Appellees.

ANSWERING BRIEF OF APPELLEE AND APPELLANT VIVIAN WINGET.

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ARGUMENT.

After a brief discussion of the evidence on the points brought out by defendant Standard on its opening brief, this argument will be broken down into the general headings of said defendant's argument in such opening brief.

Discussion of Evidence.

To avoid liability under its policy of insurance in this case, defendant Standard is apparently relying solely upon its third affirmative defense in its answer on file in the action, Paragraph II of which reads as follows:

> "Despite said express condition contained in said policy the said Billy Towry failed, neglected, and refused to cooperate with this defendant and failed, neglected, and refused to assist in securing and giving evidence but on the contrary concealed evidence from this defendant and made false and untruthful statements both to this defendant and in a sworn deposition intended for use upon the trial of said actions in the State Court." [Tr. p. 17.]

The clause in the policy upon which this defense is based is Paragraph 8 of the conditions, the applicable portion of which reads as follows:

> "The insured shall cooperate *with the company* and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits." (Emphasis mine.)

In so far as this matter of cooperation is concerned, let us examine the acts of Towry and the circumstances surrounding those acts in chronological order to determine whether Towry complied with his obligation under the terms of said policy.

The first meeting between the assured Towry and the defendant Standard was on January 20, 1949, two days after the accident. At that time, a Mr. Fraser, representing the insurance company, called upon Towry at the hospital where he was confined with injuries from the

accident. At that time and place, Mr. Fraser presented a document [Standard's Ex. D for Identification] to Towry for Towry's signature and Towry signed the same as requested without reading it or having it read to him. The document was prepared by someone other than Towry. [Tr. pp. 123 to 128.] Mr. Fraser was not called as a witness by Standard nor was any excuse offered for failure to call him. In the document so presented by Fraser to Towry there was the statement "I had not been drinking." Nevertheless, Towry cooperated with the company on this first occasion and did as they requested, namely signed a paper presented to him.

Next in chronological order was a meeting between defendant Mack and Mr. Medlen, representative of the insurance company, in April, 1949, at which time Mack advised Medlen that Towry had been drinking a small quantity of beer on the day of the accident. [Tr. p. 176.]

Next was a meeting between Medlen of the insurance company and Towry in July, 1949, at which time Towry signed a document [Standard's Ex. E] which stated all of the facts of the accident and included a statement worded "none of us had any intoxicating liquor to drink." Despite the fact that Medlen knew Towry had been drinking beer as he was informed in April, no question was propounded to Towry regarding the drinking of beer in the July meeting. Towry explained that at the time he signed the July statement he understood that the words "intoxicating liquor" do not include beer. [Tr. pp. 131 and 141.] His understanding in this respect is reasonable in the light of the fact that when 3.2 beer was legalized it was considered non-intoxicating. (See 27 U. S. C. A., Sec. 64a, and *Commonwealth v. Rigo,* 249 Ky.

824, 61 S. W. 2d 900.) Thus, it appears conclusive that Towry cooperated with the company in answering all of their questions as he understood them in the July meeting.

The next meeting between Towry and anyone from the insurance company was at the deposition taken on October 28, 1949, at the offices of James C. Hollingsworth, Ventura, California, attorney for defendant Mack. On that occasion, Mr. Wayne Veatch of Bauder, Gilbert, Thompson, Kelly and Veatch, represented Towry at the instance of the insurance company. Towry was called at the deposition as a witness "on behalf of plaintiffs under the provisions of Section 2055 of the Code of Civil Procedure" and pursuant to a stipulation offered by his then counsel Mr. Veatch "that he have an opportunity to read over and make any corrections (in the deposition) should he choose to do so, and if he does not sign *after a reasonable opportunity has been given* it might be used without signature." [See deposition p. 1, Standard's Ex. C; emphasis ours.] No instructions were given Towry regarding what he was to say or what the nature of a deposition was by his attorney nor by any other attorney in the actual taking of the deposition itself. The deposition was taken with defendant Mack and both his attorneys present, with the plaintiff Winget present and her father, the court reporter, the writer and Towry's then attorney Mr. Veatch. Even though they were related by marriage, there were strained relations between Towry and the plaintiff Winget and her father by reason of the filing of the action against Towry. [Tr. pp. 142 to 145.]

In the taking of the deposition, in answer to questions by Mr. Hollingsworth and the writer, *not by anyone from the insurance company,* Towry denied that he drank beer on the day of the accident. Between March 13 and

20, 1950, when the deposition was first presented to him for correction, he corrected it to read the truth regarding the misstatements of fact [Tr. p. 173], namely, that he had had some beer to drink.

At the time of the taking of his deposition, Towry was still of the understanding that intoxicating liquor did not include beer. He was in the state of mind that if he answered that he had not been drinking beer the chances of having judgment against him would be lessened and he felt that he was cooperating with the insurance company in saying that he had not had any beer. [Tr. pp. 146 and 147.] He had actually drunk only 5 or 6 small bottles of beer between 10:00 or 11:00 in the morning and 5:30 or 6:00 in the evening when the accident occurred and during that period had had a meal at noon and 2 or 3 sandwiches in the afternoon. Obviously, with that amount of beer over that period of time and with that amount of food in a man the size of Mr. Towry, as was apparent to the jury in this case, no cause of action for intoxicated driving could be predicated upon Towry's drinking. If Towry were not cooperating and wanted to defraud the insurance company so as to gain something for his sister-in-law, his easiest method would have been to say that he had drunk a considerable amount of liquor or beer and to continue maintaining such a story was the truth. There is nothing anywhere in the evidence to indicate that he was trying to avoid any criminal prosecution and the only reason expressed anywhere in the evidence for him denying at the deposition that he had drunk beer was his feeling that he would avoid the liability or avoid having the insurance company pay. [Tr. p. 147.] This evinces an attitude of cooperation rather than non-cooperation.

Next in chronological order, Medlen of the insurance company received an indication that there had been drinking on the day of the accident on about November 10, 1949, some 10 or 12 days after the taking of the deposition. [Tr. pp. 118 and 119.] He did nothing until late November or early December, 1949, at which time he contacted Towry and was immediately advised by Towry that he had had some beer to drink and told Towry "we have to keep this quiet, don't go talking to anyone about it." [Tr. pp. 148 and 149, and 179 to 181.] Up until the meeting in late November or early December, no one from the insurance company had told Towry to tell all the truth and all of the facts. During all of the time Towry had been answering any questions they asked truthfully, signed all papers presented, went to all meetings called, took off from work and lost wages doing so, signed answers to complaints and appeared at offices as requested. [Tr. pp. 150 and 151.]

The insurance company did nothing until the following February 28th, even though they definitely knew there had been drinking of beer. On February 28, 1950, Mr. Ellerby of the insurance company met with Towry who took off from work in response to the insurance company request and, carefully following the instructions of Ellerby, answered "true" or "false" to questions propounded by Ellerby from the deposition without giving Towry any opportunity to explain his answers. The deposition had not yet at that time nor until after March 13th been presented to Towry to correct in accordance with the stipulation of his attorney Mr. Veatch that he have an opportunity to read it over and make any corrections should he choose to do so. [Tr. pp. 152 to 155.]

Mr. Towry, following the instructions of Mr. Medlen, said nothing to anyone until he heard that the insurance company attorneys were withdrawing from the case and then he consulted an attorney of his own choosing and was then given an opportunity to make a correction of his deposition which should have been given him long before. This was around the 16th of March, 1950. [Tr. pp. 156 and 157, and 90 to 93.] Showing his state of mind as to why he had denied drinking beer, Towry revealed to this attorney, Mr. Willard, that he wanted to help the insurance company all he could and "he just said no, he hadn't had any intoxicating liquor to drink." [Tr. pp. 99 to 102.]

Next, on March 20, 1951, Mr. Willard, acting for Mr. Towry, informed insurance company attorneys that the changes in the deposition had been made or would be made. [Tr. pp. 93 and 94.]

All of the foregoing evidence was presented to the jury and it shows clearly that not only is there substantial evidence to support the verdict of the jury but the great weight of the evidence shows that Towry cooperated with the insurance company. Certainly his good faith and his good intentions and motives underlying his statements and conduct are upheld by the evidence. Further, it seems certain that the misrepresentations were not of material facts and circumstances in the light of the fact that intoxicated driving could not be proved by the consumption of 5 or 6 small bottles of beer over a period of 7 or 8 hours during which a meal and sandwiches were also consumed by a man the size of whom was within the observation of the jury. See 34 *Journal Criminal Law & Criminology* 202, to the effect that in an average 150-pound man (Towry weighed considerably more) it takes

3 ounces of pure alcohol (200 proof) to cause a blood test of 150 which is designated by the National Safety Council as the point when a driver becomes intoxicated sufficiently to be an unsafe driver. Therefore it would take six drinks (one ounce each) of *100* proof whiskey to cause a blood showing of 150. Standard bottles of eastern beer contain 12 ounces of fluid and of western beer, 11 ounces. Standard alcoholic content of beer is 4% by volume (3.2 by weight). Thus, one bottle of eastern would contain 0.48 ounces of alcohol, and, if Towry had a total of six eastern beers, the maximum blood count he could possibly show would be 144, which is considered by the National Safety Council as sober. The article then goes on to point out that alcohol is eliminated by urination and body absorption over a period of hours and especially where food is consumed, so that the maximum blood count in Towry at the time of the accident would probably be not more than 100 and very likely less than 50.

The immateriality of the representations by Towry regarding drinking is further borne out by offers of evidence refused admission by the trial court. For instance, Plaintiff's Exhibit 1 for Identification, refused admission into evidence [Tr. p. 182], is an instruction presented to the State Court and which bore the handwriting of the trial judge in State Court to the effect that he had refused the instruction because there was no evidence in the case concerning intoxication, the subject of the instruction. Also Winget's Exhibit 5 for Identification, refused admission into evidence [Tr. p. 185], shows the attempt by plaintiff Winget in the State Court to dismiss counts 2 and 3 of the complaint concerning intoxication on the grounds that intoxication was not proved.

Cooperation, or Lack of It, in This Case, Is a Question of Fact, and Appellate Court Is Bound by the Jury's Verdict.

This phase of the argument, corresponding with paragraph numbered I of Standard's opening brief, will be divided into the following subdivisions, namely: (a) distinguishing cases cited by Standard, and (b) law supporting proposition that cooperation is a question of fact and Appellate Court is bound, and (c) prompt withdrawal and/or estoppel.

(a) Distinguishing Cases Cited by Standard.

At the outset, a quotation from *Wright v. Farmers Automobile Inter-Insurance Exchange* (39 Cal. App. 2d 70, 102 P. 2d 352 (May 1940)) is definitely in order. That is one of the cases discussed by Standard at page 14 of its brief. There, the court said at page 81 as follows:

> "The fact that circumstances under which the insurer may rightfully claim lack of cooperation and assistance, or the concealing or *misrepresentations of material facts and circumstances* concerning the subject of the insurance in all cases cannot be measured by any legal standard or weighed by any set of legal scales. *In applying the rule, consideration must be given to the facts and circumstances of each case as presented.*" (Emphasis ours.)

In that case the insured gave a statement to the adjuster two days after the accident in which he stated he was driving at 50 miles per hour or a little less, that his guests had not complained about his driving and that the car hit a chuck hole in the road causing it to go out of control. He then gave a second statement to the insur-

ance company attorney to the effect that he was traveling 55 miles per hour and that the guest had mentioned his speed just before the accident. He then gave a third statement to the insurance company attorney that he was driving 55 to 60 miles per hour, that the guest complained of his speed on two occasions, that he did not know what caused the car to go out of control and that "he thought the insurance company should pay (Wright) something because he was injured." At the trial, the assured testified he was driving 60 to 65 miles per hour, that the guest asked him to slow down and that he did not do so and that he was unable to keep the automobile on the paved portion of the road because he "was going too fast" (as against his denial in his answer that the accident had occurred because of his speed and his previous statement that the car turned over when he hit a chuck hole in the road which he had not seen).

Two members of the Appellate Court by majority opinion held that the foregoing facts constituted a misrepresentation of material facts and failure to cooperate as a matter of law. There was no conflict whatsoever in the evidence as to the making of the four different statements or as to the motive or intent for making such conflicting statements. On the contrary, the evidence definitely showed an intent to defraud the insurance company so that the guest could get damages. Clearly the case is one of non-cooperation in the light of the repeated false statements upon obviously material facts.

The case of *Valladao v. Firemans Fund Indem. Co.* (13 Cal. 2d 322, 89 P. 2d 643 (April, 1939)) is likewise easily distinguishable from the instant case. In that case the assured had pleaded guilty to and been fined for two reckless driving charges prior to the accident in question.

The assured was the driver but fled the scene of the accident and represented that another party had been driving, and that the assured had not even been in the truck at the time of the accident. A day or two later the assured again made the same false statements to the insurance company. When action was filed against him the assured again made the same false representations to the insurance company attorney. Later the same day he visited the scene of the accident with the attorney and related the same falsifications in detail. On a fifth occasion the assured verified answers based upon the misrepresentations. A month or two later he called upon the insurance company attorney and again related in detail the same misstatements.

Obviously in that case there was a repeated and prolonged failure on the part of the assured to cooperate with the insurance company and tell the truth with intent to defraud the insurance company and protect himself against criminal prosecution. The court pointed out that the assured had knowingly, wilfully and repeatedly misrepresented the identity of the person driving the truck at the time of the accident, a fact unquestionably material to the insurer.

The court then stated at page 330 as follows:

> "It is generally established, and we shall not pause to refer to the authorities, that what constitutes cooperation (or the lack of it) on the part of the assured, within the meaning and effect of a cooperation clause, is ordinarily a question of fact. This is so because a dispute normally exists as to the actual statements and conduct of the assured in the premises *or because of the existence of an uncertainty as to the intent or motive underlying his statements or conduct.*" (Emphasis ours.)

In that case, there was no dispute whatsoever concerning the falsification or the intent or motive underlying the falsifications. In our case, on the contrary, there is a definite issue as to the intent or motive and good faith of the assured in making the statements he did. It is submitted that the preponderance of the evidence and at least the substantial evidence is to the effect that Towry's only motive and intent in making his misrepresentations at the time of the deposition (admittedly false) was to protect the insurance company and to, in good faith, cooperate with it. As to statements made previous to the deposition by Towry which Standard claims were false, a dispute exists as to the actual falsehood of such statements, Towry explaining that he did not imbibe in intoxicating liquor as he understood the meaning of those words. The jury resolved this conflict in his favor.

There is also the further distinction of the case at bar on the grounds that there was a conflict as to the materiality of the misrepresentations by Towry.

Thus, when we analyze the *Valladao* case, we find that it is authority for the position of the plaintiff Winget rather than for the defendant Standard.

The case of *Margellini v. Pacific Automobile Ins. Co.* (33 Cal. App. 2d 93, 91 P. 2d 136 (May, 1939)) involved a cooperation clause which provided that the insured should give immediate written notice of any accident with the fullest information obtainable, including names and addresses of witnesses, forward any notice of suits and aid in effecting settlements, in obtaining evidence and witnesses and to fully cooperate with the company at all times. There, the insured's wife was in an accident, failed to report to the insurance company, disappeared

without any forwarding address, and concealed herself despite repeated and prolonged efforts to locate her, even by her own attorney. The insurance company obtained offers of settlement well under the judgment subsequently obtained. The assured reported to the company and advised he would get the information concerning the accident as soon as he located his wife. He failed to contact them again at all. He and his wife were served with summons and complaint almost a year after the accident and waited three months before sending same to the insurance company which then returned the papers refusing to defend. Obviously there was failure to comply with the clause in the policy requiring that they give "immediate" notice, etc. No false statements were involved at all. Certainly the insurance company could not be required to defend when it had no information concerning the accident furnished to it by the assured.

In *Home Indemnity Co. of New York v. Standard Accident Insurance Company of Detroit* (167 F. 2d 919, C. C. A. 9th (May, 11, 1948)), cited by Standard, the assured did the following things: First, he stated to the company that he had not been in an accident, had not struck anyone, knew nothing about the accident and his car was damaged at the race track. Second, he gave sworn statements to the company therein repeatedly denying he had been in an accident, by 7 unqualified denials and 3 modified denials. Third, he later informed the company he had fallen asleep and the accident may have happened then. Fourth, he told the company he was going to plead guilty to a charge of failing to stop and render assistance (480 Cal. Veh. Code) and "can't tell you why" (it appeared that the assured by entering such a plea escaped prosecution for manslaughter). Fifth, the

insurance company objected to the assured's attorney in the criminal matter that the guilty plea should not be entered but this was to no avail. Sixth, the assured pleaded guilty. Seventh, the assured signed answers admitting he was involved in the accident after the insurance company had prepared for him answers denying he was in it. In that case, it appears clear that the assured was trying to defraud the insurance company with the intent of saving himself from a manslaughter prosecution.

There was no serious dispute in the evidence as to the accuracy of the seven acts and representations above described. The Appellate Court pointed out that in setting aside the trial court's findings as "clearly erroneous," "the first two of these findings are inferences from undisputed testimony or documentary evidence, from which we are in as good a position to draw deductions as was the court below." There was no question as to the falsity of the statements nor as to the intent or motive of the insured in making them in that case. The case is clearly distinguished from the present one where those questions exist.

In the case of *Salonen v. Paanenen* (71 N. E. 2d 227 (Mass., 1947)) the assured gave a statement to the adjuster for the company shortly after the accident in which she stated that she noticed a Ford traveling in the opposite direction but she did not remember much after that; that she moved over a little closer to her right side of the road and that her auto must have gone off the road and struck a tree on the right side and that she was unable to say whether or not the Ford had crowded her off the road. She also stated that the guest in the car did not object to the manner of the speed of her auto on this occasion.

At the trial, she testified repudiating material portions of this first statement and elaborated a substantially different version of the accident, which in substance was that she was traveling at 40 to 45 miles per hour, her automobile swerved from one side of the road to the other several times, the guest objected to the manner in which she was driving, that she, without slackening her speed, looked around to comment about some milk that the guest had spilled and while doing this the automobile went off the road. She also testified that she did not see the old Ford referred to in the first statement. She admitted that she desired to see her sister, the guest, compensated for her injuries. Clearly she disclosed an intent to defraud the insurance company for the benefit of her sister and obviously the only holding of the court in such a situation would be that the intentional furnishing of such false information of a material nature would be a breach of the cooperation clause.

In all of the foregoing cases cited by defendant Standard, a definite intent to defraud the insurance company existed, there was no conflict regarding the nature of the acts or false statements or of the motive or intent underlying the making of them and the materiality of each misstatement or failure to act stuck out like a sore thumb. On the other hand, in the case at bar, there is no evidence whatsoever of any intent to defraud the insurance company, the evidence at least substantially shows that the assured's intent and motive was to cooperate with the insurance company and it seems entirely without merit to contend that the drinking of 5 or 6 small bottles of beer over a period of 7 or 8 hours is material in any way to the defense of a wilful misconduct case. Obviously the man was not intoxicated and if he was not intoxicated he

must be deemed to have been sober. His acts of wilful misconduct are entirely separate and distinct from any intoxication or lack of intoxication. At least there was a conflict in the evidence as to the materiality of the representations, which conflict was resolved in favor of plaintiff Winget.

(b) Law Supporting Propositions That Cooperation Is a Question of Fact and Appellate Court is Bound.

The case of *Shaw v. Imperial Mutual L & B Assn.* (4 Cal. App. 2d 534 at 537) states as follows:

> "The rule is well established that an untrue statement, in order to avoid an insurance policy, must have been knowingly and intentionally made *with the intention of defrauding the insurer; and whether a false statement was so made is a question of fact for the jury or trial court.*" (Emphasis ours.)

See also,

Pedrotti v. American National Fire Ins. Co. (90 Cal. App. 668), and

Miller v. Firemans Fund Ins. Co. (6 Cal. App. 395).

In *Porter v. Employers, etc., Corp.* (40 Cal. App. 2d 502) the court said at pages 510 and 511 as follows:

> "What constitutes cooperation, or lack of it, on the part of the assured within the meaning of such clauses, is a question of fact, except where there is no dispute in the evidence. (Valladao v. Firemans Fund Indem. Co., *supra*). Where, however, there is a conflict as to what was said by the insured, that conflict, like other conflicts, is determined by the findings of the lower court."

In that case there was a substantial discrepancy between statements made by the assured shortly after the accident while she was in the hospital, as written down by the insurance adjuster and signed by the assured, and the testimony of the assured at the trial. The court held that there was no evidence that the insured wilfully made any false statements, or that she did not act in good faith or that she did not make a full, fair and complete disclosure in any material respect to the insurance company. Likewise, in the case at bar, there is evidence of good faith and certainly there is no evidence that the assured made any statements *to the insurance company* which were false. It is true that he made false statements to attorneys for the plaintiffs in the case but not to the insurance company in violation of his obligation under the policy. Nor is there any intent in the instant case to defraud the insurance company.

In the case of *Pacific Indem. Co. v. McDonald* ((9th Cir.) 107 F. 2d 446, 131 A. L. R. 208) the assured made false statements to the company and then about a week later corrected the statements truly stating the facts concerning the accident. The case involved intoxication and gross negligence on the part of the assured in injuring his guest. The insurance company brought a declaratory relief action to determine whether they were required under the policy to defend, claiming non-cooperation by giving of the false statements. The court held that it was a matter for the jury as to whether the assured had cooperated with the company.

In *Norton v. Central Surety & Ins. Co.,* 9 Cal. App. 2d 598 (1935)) the injured guest obtained a judgment and sought recovery against the insurance company which defended on the basis of non-cooperation by its assured.

The jury found against the defense of non-cooperation, and the court held that the issue of lack of cooperation on the part of the assured sufficient to constitute a breach of the policy, was one of fact and that the burden of proving this affirmative defense is obviously on the insurer. The court stated that the implied accurate findings of the jury on the question of cooperation as well as by the trial court in ruling on motions is conclusive on the appeal unless it can be held as a matter of law that the evidence in the case is without substantial conflict and the only reasonable inference to be drawn therefrom is contrary to said findings. The power of the reviewing court begins and ends with the inquiry as to whether there is any substantial evidence in the case to sustain the findings or, if the evidence be conflicting, whether the facts and circumstances are such that reasonable minds might draw different inferences therefrom and if these inquiries be answered in the affirmative, the findings must be sustained. Moreover, in determining these questions, all inferences reasonably deducible from the evidence favorable to the prevailing party must be indulged in by the reviewing court.

In the case of *Mercer Casualty Co. v. Lewis* (41 Cal. App. 2d 918) the insurance company attempted to avoid liability on a policy on the basis that the representations on the application for the policy were fraudulent. However, the evidence showed that the application was filled out by agents of the insurance company. The court held that obviously there can be no misrepresentation where there was no representation and there can be no breach of warranty without warranty. In the instant case, there was no representation to the insurance company that was false but only to attorneys for opposing parties who had

called the assured as their witness. The clause upon which Standard relies states that the insured "shall cooperate *with the company*" and says nothing about his cooperation with anyone else.

In the *Mercer* case, the court held that there was no failure to cooperate with the insurance company in response to any demand made by them of such, and that the question of cooperation was a matter of fact and that the finding of the trial court upon substantial evidence supporting it is conclusive.

See also *Panhans v. Associated Indem. Corp.* (8 Cal. App. 2d 532) where the court held that lack of cooperation on the part of the insured sufficient to constitute a breach of policy is one of fact and that the Appellate Court would not disturb the finding of the jury that the acts of the insured did not constitute a material breach of the cooperation clause.

In *Wormington v. Associated Indem. Corp.* (13 Cal. App. 2d 321), hearing in the Supreme Court denied, the court held that a representation even though untrue, does not affect the validity of a policy of insurance unless it is material. In that case, the insured did not appear at the trial but he did report the accident within 48 hours after it occurred and gave his deposition. At the time the assured's deposition was taken the insurance company counsel was present with full opportunity to examine the assured. The court stated that in its opinion the finding of the trial court that the assured fully cooperated with the defendant insurance company in the preparation of the defense of said action was conclusive because of the substantiality of evidence to sustain the decision arrived at by the trial court upon this issue.

Rule 61, 28 U. S. C. A. (Fed. Rules Civil Procedure) provides as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Thus, in the instant case, submission of the issue of cooperation to the jury in the lower court to determine whether Towry cooperated on a material matter and to determine his motives and intent and good faith is not error and no proof of substantial injustice can be shown. The jury must necessarily have determined the misrepresentations were not material and that the assured's motives and intent were in good faith.

In *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.* (178 F. 2d 541 (9th Cir.)) the court holds that the trial court's interpretation is not binding on appeal but the reviewing court will attach weight to the trial court's interpretation and will follow it if it is reasonable and will not substitute another interpretation although it seems equally tenable and a court of appeals may draw its own inferences from undisputed facts or purely documentary evidence. The court there held that a finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the *definite and firm conviction* that

a mistake has been committed. Under the rule that findings may not be set aside unless they are clearly erroneous, the findings of the trial judge will not be disturbed if supported by substantial evidence after giving full effect to the opportunity which the trial judge had to observe the witnesses, judge their credibility and draw inferences from contradictions of the testimony of even the same witness.

Thus, in the *Home Indemnity Co.* case (*supra*) cited by Standard, the court pointed out that judicial review of findings of the trial court does not have the statutory or constitutional limitations of findings by administrative agencies or by a *jury* and that the Appellate Court may reverse findings of fact by the trial court where clearly erroneous. However, under Rule 61 (*supra*), the Appellate Court could not reverse findings of a jury unless it appears to be inconsistent with substantial justice.

In *Bernadich v. Bernadich* ((Mich.) 283 N. W. 5), the plaintiff was injured in an accident in the vehicle driven by her cousin. The cousin ran off the pavement into a culvert and the automobile was overturned. The cousin (assured) advised the insurance company a few days after the accident that it was due to the negligence of the operator of another vehicle coming toward him. Approximately four months after the accident the assured gave the insurance company a similar false statement. Approximately 18 months later he again repeated the statement and then shortly thereafter when the case was about to be called for trial the assured advised the company the truth that there was no oncoming car. The question was submitted to the jury which found that the defendant did not attempt to perpetrate a fraud on the insurance company. The Appellate Court held there was

no proof of failure to comply with the provisions of the policy requiring the insured to cooperate and assist and quoted with approval language from the case of *Rockmiss v. New Jersey Manufacturers Assn. Ins. Co.,* 112 N. J. L. 136, 169 Atl. 663) to the effect that the version of the insured of the occurrence contained in the first statement tended to relieve him from negligence, and it cannot be said that this denotes a failure to cooperate and assist the insurer in making a defense or a purpose to perpetrate a fraud. Rather the reverse is the case. *The insured thereby evinced a willingness and purpose to cooperate with and assist the insurer in resisting the claims for damages asserted by the plaintiff.*

From all of the foregoing it is apparent that in all cases cited by defendant Standard, the assured had a motive to deceive other than that of cooperation, such as keeping out of jail, preventing second arrest, losing a driver's license, helping a relative to recover damages, etc. In the instant case there is no evidence at all to support any such motive on the part of Towry. On the contrary, the evidence shows by the great weight thereof that Towry intended to help the insurance company in making his false statements.

In the light of these facts and the law set forth by plaintiff Winget above, it is clear that the question of cooperation is one of fact which has been determined in Winget's favor by the jury and which should not be disturbed upon appeal.

(c) Prompt Withdrawal and/or Estoppel.

It seems needless to pursue this argument further, however, there are two additional theories upon which the Appellate Court may find in favor of Winget. First of all, prompt withdrawal of a false statement without a showing of prejudice cures the falsification.

It is to be noted that approximately 30 days after he gave his false statement at the deposition and at the first opportunity, Towry advised the insurance adjuster of the truth regarding his drinking. In that 30-day period nothing took place which could in any way prejudice the insurance company. The case of *Pacific Indem. Co. v. McDonald* ((9th Cir.) 107 F. 2d 446, 131 A. L. R. 208) holds that the prompt withdrawal of a falsehood cured the default of an assured who made the same in the absence of some showing that the company was prejudiced by the delay in the telling of the truth.

There is also the question of whether the insurance company was estopped to deny its liability. It is to be noted that as early as April, 1949, the defendant Mack advised Medlen of the insurance company that Towry had been drinking beer. [Tr. p. 176.] He made no inquiry of Towry regarding the drinking of beer until late November or early December. About November 10, 1949, Medlen again received information to the effect that Towry had been drinking beer. He finally called upon Towry in late November or December and obtained the truth. At the time Medlen obtained this information he advised Towry to keep it quiet and Towry, following his instructions, did so. Nothing further was done until February 28, 1950, at which time Mr. Ellerby of the insurance company questioned Towry without giving him opportunity to explain his answers. Trial of the case

was set for March 27, 1950, but the insurance company did nothing until March 13th at which time they wrote a letter and misdirected it to Towry advising that they were disclaiming liability. They then attempted to withdraw from the case on the very eve of the trial. In the light of this continued participation on the part of the insurance company in the defense of Towry, for almost a year, with knowledge of the fact that he had been drinking beer and then to suddenly attempt withdrawal from the case at a time when the preparation of a defense by other counsel was considerably hampered by the shortness of time before trial, appears to the writer to be lulling the assured into a sense of security and amounting to an estoppel to deny liability.

The Court Did Not Commit Error in Permitting Towry to Explain Changes in His Deposition.

Defendant Standard at page 17 of its brief claims that it was error for the trial court to admit the explanation by Towry to his personal attorney of the facts surrounding the giving of his deposition and of his state of mind at that time. Mr. Willard, the personal attorney, was called as a witness for defendant Standard and upon direct examination was asked whether he had discussed the taking of the deposition with Towry and concerning the conversation that was had between Willard and Towry. [Tr. pp. 90 to 93.] In other words, defendant Standard opened it up on direct examination and on cross-examination plaintiff Winget was entitled to go into the details of that conversation.

This evidence was admissible on another ground also, namely, to prove the state of mind, intent or motive of Towry at the time of the giving of his deposition. (See

Sprague v. Walton (145 Cal. 234) holding that there is no better proof of intention than declared intention. See also *Dinneen v. Younger* ((1943) 57 Cal. App. 2d 200), *Hansen v. Bear Film Co.* ((1946) 28 Cal. 2d 154) and *Whitlow v. Durst* ((1942) 20 Cal. 2d 523), all holding that when intent is a material element of a disputed fact, declarations made after as well as before and at the time of the act that indicate the intent with which the actor performed the act are admissible in evidence as an exception to the hearsay rule, irrespective of whether the declarations are self-serving. See also, *Katz v. Enos* ((1945) 68 Cal. App. 2d 266) holding that the declarations of a decedent to his attorney as to the intent with which he executed a deed are competent on the issue of such intent.

The Court Did Not Commit Error in Excluding Standard's Exhibit D.

The objection of Winget to the offer of Exhibit D on the grounds that there was no proper foundation laid was sustained by the trial court. [Tr. p. 124.] The ruling was proper. Towry testified that he had not read the statements nor had it read to him and did not know what it contained and that he merely followed the instructions of the insurance adjuster and signed the statement. It might properly be contended that the statement would be binding upon Towry if it were in the hands of an innocent party to the transaction but where the statement, as in this case, was prepared by the insurance adjuster and signed by Towry without him knowing what it contained, obviously there is insufficient foundation upon which to allow the introduction of the statement into evidence so as to bind Towry.

Standard offered to prove by the witness Towry that Towry gave a report to a representative of the Highway Patrol in which he stated that he had not been drinking. This offer was made after Towry had testified as follows: "I don't recall what I told the Highway Patrol that night." [Tr. p. 168.] The meeting that night with the Highway Patrol was the only meeting with the patrol that Towry had or testified to. In the light of such testimony, the court properly refused the offer of proof.

If the defendant Standard had wished to get the statement into evidence, it would seem that it should have brought the adjuster Fraser to testify regarding the statement as well as the member of the Highway Patrol who did the questioning. No excuse for its failure to bring either of these witnesses was offered by defendant Standard and in the light of such failure, defendant Standard would seem to have waived its right to establish a proper foundation for the admission of Exhibit D.

The only thing authentic about the document established by the evidence was the signature of Towry to which he testified. The situation is much like that in the case of books of account which must be established by independent proof as to their correctness before they are admissible in evidence. See *Kerns v. Dean* (77 Cal. 555).

In the case of *Woodman v. Pacific Indem. Co.* (33 Cal. App. 2d 321 at 329) the court points out as follows:

> "Section 4½ of Article VI of the Constitution prohibits us from reversing a judgment 'on the ground . . . of improper admission or rejection of evi-

> dence . . . unless . . . the court shall be of opinion that the error complained of has resulted in a miscarriage of justice.' . . . We are therefore precluded by the Constitution from reversing the judgment on that ground."

Rule 61, 28 U. S. C. A. (Fed. Rules of Civil Proc.) would likewise apply as does *Hughes v. Pacific Wharf and Storage Co.* (188 Cal. 210). In that case the exclusion of a letter written by the defendant corporation to the plaintiff, offered for the purpose of showing the contemporaneous construction of the contract by the parties, could not have resulted in a miscarriage of justice where other evidence of greater weight upon the same subject and to the same effect as the letter in question was received in evidence.

At this point, a quotation from *Porter v. Employers, etc., Corp.* (40 Cal. App. 2d 502 at 513) is pertinent. There the court stated as follows:

> "Certainly, it cannot be urged seriously that Mrs. Adamson is responsible for the carelessness of the adjusters in failing to record her statements properly. Nor can it be contended that by signing statements without reading them, in which statement the adjusters carelessly or by design misrepresented what had been told them, that the insured was guilty of lack of cooperation as a matter of law. She was not dealing with these adjusters at arm's length. As agents of her insurance company she was entitled to believe that they would prepare a proper and correct memorandum of her statements."

When Mr. Fraser of the insurance company gave Towry the statement in the hospital at a time when he was suffering from his injuries in the accident, and requested Towry to sign and Towry complied, he thereby cooperated with the insurance company in signing a false statement. The insurance company made the false statement for him to sign. Can they now claim the benefit of their own wrongful act? Isn't that getting out of their policy through their own violation of duty to be truthful? Can the insurance company on the one hand demand the insured be truthful to them and on the other hand insist he sign false statements (prepared by them, whether mistakenly or not), and take advantage of such false statement at a later date?

In addition, the good faith of the insurance company in the case is further in doubt, when we consider the fact that Mr. Ellerby insisted Towry accompany him for the purpose of taking a sworn statement on February 28, 1950, in which Towry was denied the privilege and right of explaining his answers. After having instructed assured to remain silent concerning his false statements, and without giving him the opportunity to read over and make corrections of his deposition in accordance with the suggestion and stipulation of their own attorney and in accordance with the right to correct the deposition given him by statute (*Section 2206, C. C. P.*), the insurance company surreptitiously did everything to avoid its liability.

The evidence appears to the writer to indicate from the very beginning an evil design on the part of the insurance company to get out from under a binding contract upon the flimsiest excuses imaginable. Are we to deny Towry the protection for which he paid a valuable con-

sideration on the evidence produced in this case? How can insurance agents expect to continue the sale of policies if precedent is to be established such as this sought by defendant Standard? The door would be opened for the commission of fraud by insurance companies inducing poor assureds not to cooperate to the loss of badly injured plaintiffs and the advantage of insurance companies.

Conclusion.

The preponderance, or at least the substantial evidence supports the verdict of the jury. The issues are questions of fact for the determination by a jury and the Appellate Court, in the interests of substantial justice, is bound by that verdict.

Respectfully submitted,

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